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**BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of : John T. Pienkos
Serial No. : 10/783,540
Filing Date : February 20, 2004
For : Stuffed Dough Pocket With Grasping Extension
Confirmation No. : 7442
Group Art Unit : 1794
Examiner : Weinstein, Steven L.

CERTIFICATION OF SUBMISSION

I hereby certify that, on the date shown below, this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Mail Stop Appeal Brief—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Date: MARCH 23, 2009

John T. Pienkos

**Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450**

Dear Sirs:

REPLY BRIEF UNDER 37 C.F.R. §41.41

This Reply Brief is being filed pursuant to 37 C.F.R. §41.41 subsequent to the Examiner's Answer mailed on January 23, 2009. No fee is believed be due in connection with this submission.

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I. TABLE OF AUTHORITIES

None.

II. STATEMENT OF ADDITIONAL FACTS

None.

III. ARGUMENT

Independent Claim 1 and Claims 2-3, 5-11, 13, and 21-23 Depending Therefrom

The Applicant acknowledges the Examiner's arguments provided in the Examiner's Answer and appreciates the Examiner's attention to the present Application. Notwithstanding the Examiner's arguments, the Applicant respectfully maintains his traversal of the Examiner's rejections, for at least these additional reasons.

In the Applicant's Appeal Brief, the Applicant advanced particular reasons as to why it would not have been obvious to one having ordinary skill in the art to have arrived at the Applicant's claimed invention in view of the references relied upon by the Examiner. In particular, the Applicant argued that (1) there is no explicit teaching, suggestion or motivation within the relied upon references to combine those references to arrive at the Applicant's claimed invention and, moreover that (2) because the Applicant's claim 1 invention offers special advantages not found in the prior art in terms of addressing certain problems not addressed by the prior art, it would be improper to simply presume that one of ordinary skill in the art would arrive at the Applicant's claimed invention.

As best as the Applicant can determine, in response to the aforementioned arguments presented by the Applicant in the Appeal Brief, the Examiner's Answer did not provide any arguments contradicting point (1) above—that is, there are no arguments that would demonstrate that there is an explicit teaching, suggestion or motivation found within any of the relied-upon references to combine those references to arrive at the Applicant's claimed invention. Rather, as best as the Applicant can determine, the Examiner's Answer instead attempts to argue against the point (2) above, by contending that it would still have been obvious for one of ordinary skill in the art to arrive at the Applicant's claimed invention notwithstanding the absence of an explicit teaching, suggestion or motivation to combine the relied-upon references to arrive at the Applicant's invention because either (a) the relied-upon references do in fact provide the same solutions/advantages (in terms of addressing the same problems) as the Applicant's claimed invention or (b) regardless it would have been obvious to arrive at the Applicant's claimed invention in view of the references cited.

The Applicant strongly disagrees with both of these contentions. With respect to (a), on page 4 of the Examiner's Answer, the Examiner states

Kienle discloses a food product [with] a protrusion (#3) coupled to the pocket, wherein the protrusion is capable of being grasped and, when so grasped, the pocket is capable of being supported by the protrusion Thus, Kienle teaches both appellant's problem and appellant's solution.

On page 5 of the Examiner's Answer, it is further stated that "[s]ince [K]ienle discloses hand-holding the food product by the protrusion, the particular area for grasping would have been an obvious routine determination. Further, on page 8 of the Examiner's Answer, it is also stated that "since the intended function of the projection in the prior art is to use it as a handle for grasping, it would have been obvious to increase the size or the extent of the projection to make grasping easier".

Yet these excerpts from the Examiner's Answer appear to indicate a misunderstanding of the Applicant's argument set forth in the Appeal Brief. The problem addressed by the Applicant's claimed invention is not merely how to support a pocket-type food using a protrusion, or to make it easier for a person to hold onto/grasp pocket-type food. Rather, as explained in the Appeal Brief, the Applicant's claimed invention is directed to improving upon the relative lack of control afforded by an end-attached protrusion as disclosed in Kienle. In particular, as stated on page 11 of the Appeal Brief, it is believed by the Applicant that through the use of the Applicant's claimed invention "a consumer holding the stuffed dough pocket necessarily has greater control over the movement of the stuffed dough pocket than is the case using an 'end-attached' protrusion, and is less likely to experience a situation where the stuffed dough pocket completely disconnects from the protrusion." Further, as stated by the Applicant on pages 11 and 12 of the Appeal Brief:

[T]he extent and configuration of a protrusion such as that recited in the Applicant's claim 1 allows a consumer to support a stuffed dough pocket by holding the protrusion in a particular manner such that the stuffed dough pocket extends not only horizontally outward away from the consumer's fingers but also substantially "hangs downward" from the

consumer's fingers since a good portion of the stuffed dough pocket is located physically beneath a portion of the protrusion. The Applicant believes that, assuming that the stuffed dough pocket is supported in this manner by way of the protrusion, there will be a reduced amount of sagging and a reduced likelihood of breakage of the stuffed dough pocket with respect to the protrusion (e.g., due to a reduced amount of gravity-induced torque experienced between the protrusion and the main body of the stuffed dough pocket) than would likely occur if the protrusion was an end-attached protrusion/extension.

The Applicant respectfully submits that the fact that a protrusion provides this particular manner of support allowing for a consumer to exercise control over the movement of a stuffed dough pocket is different from the mere fact that the protrusion is big and therefore can be more easily held between a consumer's fingers. That is, whether a protrusion makes grasping easier is not necessarily the same issue as whether the protrusion allows for greater control. For example, a long, stringlike protrusion extending from a stuffed dough pocket might be sufficiently long that it could be securely fixed between a consumer's fingers; yet such a protrusion would not very well allow the consumer to exercise control over the movement of the stuffed dough pocket. Thus, the Examiner's Answer fails to demonstrate that Kienle provides the same solutions/advantages as (and addresses the same problems addressed by) the Applicant's claimed invention.

As for the Gordon patent (the '498 patent), which is mentioned in passing on page 9 of the Examiner's Answer, the Applicant notes the Examiner's comment that the Gordon patent "discloses a protrusion that extends along at least most of a 90 degree segment around a perimeter that extends around the rest of the food product". Yet the Applicant submits that the introduction of the Gordon patent does not address the issues discussed above in relation to Kienle. As has been discussed earlier in the Appeal Brief, the Gordon patent (like a number of the other references cited by the Examiner) does not appear to expressly disclose the particular achieved results or problem being solved by the configuration disclosed therein. Indeed, since the Gordon patent is a design patent, there is no expectation of such disclosure.

Further, since the Gordon patent appears to concern an edible spoon that would appear to be rigid, the Applicant believes that it would be inappropriate to draw an inference from the Gordon patent that the larger protrusion offers better control. Rather, it would seem that the protrusion could take a variety of arbitrary forms (e.g., narrow forms) without significantly impacting the controlled movement of the overall spoon. In short, for at least the above reasons, the Applicant submits that it would be inappropriate to find within the Gordon patent any basis for concluding that a particular configuration of protrusion is particularly well suited for controlling the movement of a stuffed dough pocket, or otherwise for achieving the solutions (or addressing the problems) addressed by the Applicant's claimed invention.

It should further be noted that the Examiner's Answer on page 9 appears to dismiss partly or entirely the argument that the Applicant's claim 1 invention addresses a particular problem by stating that the Applicant's discussion of pierogi or ravioli as "hard, rigid structures" is not directed to limitations found in the claims. Yet the Applicant respectfully reminds the Examiner that the Applicant's claim 1 invention is being rejected for obviousness, and the argument presented by the Applicant regarding the problems addressed by the Applicant's invention are made to demonstrate the nonobviousness of the applicant's invention under 35 U.S.C. 103(a) and thus these aspects need not be recited in the claims.

Even if it is the case that the relied-upon references fail to disclose the particular solutions/advantages achieved by the Applicant's claim 1 invention (or fail to address the problems addressed thereby), as noted above the Examiner also appears to be arguing that it would have nevertheless been obvious to one of ordinary skill in the art to arrive at the Applicant's claim 1 invention. In this regard, the Examiner's Answer states in particular on pages 4-5 as follows.

Once it was known in the art to provide a food product with a protrusion for handling purposes, including one that is a composite food product . . . , the particular dimensions of the food product, including the protrusion, used for handling, is seen to have been an obvious result effective variable and/or an obvious matter of choice and/or design [T]he relative dimensional relationships of the pocket food itself are conventional and

thus read on the recited dimensions. In fact, a product such as a calzone has dimensions more like Kienle's product, which further evidences the dimensional relationships are conventional and thus obvious.

Additionally, the Examiner further states on pages 6 and 8 of the Examiner's Answer as follows:

As for the extent and size of the projection, since Kienle, and the art taken as a whole, discloses edible, inedible and even edible/inedible composite handles, associated with food products to allow one to manipulate the food product, the particular dimension and extent of the handle, vis-à-vis the rest of the product, would have either been an obvious result effective variable, routinely and obviously determinable, or an obvious matter of choice and/or design. . . . The remarks are directed to differences in shape or dimensions which, as noted above, would have been obvious in view of the art taken as a whole. It is not convincing to argue that Kienle does not disclose the particular dimensional relationship or the particular orientation of the protrusion/handle.

The Applicant respectfully submits that these statements are unpersuasive. In these comments, there is no explanation as to why it might be obvious to choose to create a protrusion having the particular size and dimension recited in the Applicant's claim 1. Indeed, the comments seem to be nothing more than an assertion that this is true. Yet to the Applicant it is possible to find arguments why this assertion is not true. For example, given that extra food material (e.g., extra dough) typically costs extra money (at least in bulk), it would in the Applicant's view be more plausible to assume that a protrusion merely attached along a very small end portion of a pocket food as shown in Kienle would be more reasonable than a protrusion configured as recited in the Applicant's claim 1. Additionally, if calzones particularly have features that are merely the same as those disclosed by Kienle, the Applicant cannot understand how this provides any more persuasive basis for arguing that the Applicant's claim 1 invention would be obvious.

On page 9 of the Examiner's Answer, it is additionally stated that "[o]ne of ordinary skill in the art would expect that the greater the surface contact or surface area or connection there is between the protrusion and the main body, the greater the degree of support there would be. This is also a basic structural/mechanical concept and common sense". While the Applicant agrees that increasing the area of engagement between a first structure (such as a protrusion) and a second structure (such as a main body) generally results in a stronger connection between those two structures, the Applicant disagrees that this general principle would lead one of ordinary skill in the art to provide a protrusion that, as recited in the Applicant's claim 1, is coupled to a pocket "along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length dimension and the width dimension" where the length and width dimensions are defined relative to the depth dimension as stated in claim 1.

In particular, even if the above-described general principle is true, there are reasons why one of ordinary skill in the art would not create a protrusion that was coupled to a pocket along a larger and larger segment around the perimeter of the pocket. For example, a larger extent of a connection between two structures typically correspondingly produces a larger protrusion, which in turn necessitates an increase in the amount of dough and thus results in increased costs of manufacture. Thus, while a larger connection may provide greater strength in coupling, as mentioned above it may also use excessive resources and cost significantly more (especially when many thousands of such structures are manufactured). Further for example, the area of engagement between a protrusion and a pocket can also be increased by widening the area of engagement rather than lengthening it along a perimeter of the pocket. The Examiner does not explain why one of ordinary skill in the art, based upon the above-described principle, would choose to provide a protrusion having the particular, lengthy configuration recited in the Applicant's claim 1 rather than providing a protrusion that contacted the pocket over a region that was shorter and wider.

Indeed, a variety of alternate configurations of protrusions are imaginable that could potentially have similar areas of engagement with a pocket but would not be consistent with the Applicant's claim 1 invention. For example, one could create protrusions that extended not along the perimeter defined by the length and width dimensions of a pocket, but instead extended along a perimeter defined by the length and depth, or width and depth dimensions of a pocket. In

view of these considerations, the mere statement of the general principle that increased extent of engagement between a protrusion and a pocket would be pursued to achieve greater support is insufficient as a rationale for arriving at the Applicant's actual recited claim 1 invention.


For at least these reasons, therefore, the Applicant submits that the arguments advanced in the Examiner's Answer are insufficient to justify a finding that it would have been obvious to one of ordinary skill in the art to arrive at the Applicant's claim 1 invention.

Dependent Claim 13

The Applicant further submits that, in addition to the above reasoning, the arguments advanced in the Examiner's Answer are further insufficient to justify a finding that it would have been obvious to one of ordinary skill in the art to arrive at the Applicant's claim 13 invention. In regards to claim 13, the Examiner states that the "the particular conventional composite food product employed is seen to have been an obvious matter of choice".

Yet the Applicant submits that, in his own personal experience, pierogi are not conventionally viewed as a "finger-food", but rather are routinely eaten on a plate, with a fork and knife. Consequently, it is the Applicant's belief that, for this reason, it would not have been obvious in particular to create an enlarged protrusion on a pierogi as recited in the Applicant's claim 13 to arrive at a pierogi that is relatively easily picked-up and manipulated for eating with one's fingers. If the Examiner disagrees with the Applicant's contention in this regard, the Applicant would appreciate some demonstration by the Examiner that in fact the Applicant's contention is untrue.

Respectfully submitted,


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Date: 3/23, 2009

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